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Responsibility of States for internationally wrongful acts

Responsibility of States for internationally wrongful acts

Compilation of decisions of international courts, tribunals and other bodies

Report of the Secretary-General

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Abbreviations

BIT	Bilateral investment treaty
ECHR	European Court of Human Rights
GATT	General Agreement on Tariffs and Trade
ICSID	International Centre for Settlement of Investment Disputes
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States
ILC	International Law Commission
ITLOS	International Tribunal for the Law of the Sea
PCA	Permanent Court of Arbitration
UNCITRAL	United Nations Commission on International Trade Law
WTO	World Trade Organization

I. Introduction

1. The International Law Commission adopted the draft articles on responsibility of States for internationally wrongful acts at its fifty-third session, in 2001. In resolution 56/83, the General Assembly took note of the articles (hereinafter referred to as the State responsibility articles), the text of which was annexed to that resolution, and commended them to the attention of Governments without prejudice to the question of their future adoption or other appropriate action.

2. As requested by the General Assembly in resolution 59/35, the Secretary-General, in 2007, prepared a compilation of decisions of international courts, tribunals and other bodies referring to the State responsibility articles.[1] A further two compilations were prepared by the Secretary-General, in 2010 and 2013, on the basis of the requests of the General Assembly in resolutions 62/61,[2] and 65/19,[3] respectively.

3. In resolution 68/104, the General Assembly acknowledged the importance of the State responsibility articles and commended them once again to the attention of Governments, without prejudice to the question of their future adoption or other appropriate action. The Assembly requested the Secretary-General to update the compilation of decisions of international courts, tribunals and other bodies referring to the articles and to invite Governments to submit information on their practice in that regard, and to submit that material well in advance of its seventy-first session.

4. By a note verbale dated 10 January 2014, the Secretary-General invited Governments to submit, no later than 1 February 2016, information regarding decisions of international courts, tribunals and other bodies referring to the articles for inclusion in an updated compilation. By a note verbale dated 21 January 2015, the Secretary-General reiterated that invitation.

5. The present compilation includes an analysis of a further 72 cases in which the State responsibility articles were referred to in decisions taken during the period from 1 February 2013 to 31 January 2016.[4] Such references were found in the decisions of the International Court of Justice; the International Tribunal for the Law of the Sea; the WTO Appellate Body; international arbitral tribunals; the African Court on Human and Peoples' Rights; the African Commission on Human and Peoples' Rights; the European Court of Human Rights; the Inter-American Court of Human Rights; and the Special Tribunal for Lebanon.

6. The present compilation, which supplements the three previous Secretariat compilations on the topic, reproduces the relevant extracts of publicly available decisions under each of the articles referred to by international courts, tribunals or bodies, following the structure and numerical order of the State responsibility articles. Under each article, decisions appear in chronological order. In view of the number and length of the decisions, the compilation includes only the relevant

[1] A/62/62, Corr.1 and Add.1.
[2] A/65/76.
[3] A/68/72.
[4] Joined cases that resulted in the same decision have been counted as one case. Cases that resulted in largely similar decisions have been counted separately, but might have been referred to as one decision to the extent that the content of the decisions is identical.

extracts of the decisions referring to the State responsibility articles, together with a brief description of the context in which the reference was made.

7. The compilation contains those extracts in which the State responsibility articles are invoked as the basis for the decision, or where the articles are referred to as reflecting the existing law governing the issue at hand. It does not cover the submissions of the parties invoking the State responsibility articles, nor opinions of judges appended to a decision.

II. Extracts of decisions referring to the articles on responsibility of States for internationally wrongful acts

General comments

International arbitral tribunal (under the ICSID Convention)

8. The arbitral tribunal in *The Rompetrol Group N.V. v. Romania* acknowledged that although the status of the State responsibility articles remains that of a draft, the "degree of approval accorded to them by the UN General Assembly and in subsequent international practice amply justifies treating the draft Articles as guidelines for present purposes".[5]

International arbitral tribunal (under the ICSID Convention)

9. In *ConocoPhillips Petrozuata B.V., and others v. Bolivarian Republic of Venezuela*, the arbitral tribunal indicated that the State responsibility articles "have been regularly referred to in subsequent decisions, including ICSID awards and decisions, as codifying or declaring customary international law".[6]

Permanent Court of Arbitration (under UNCITRAL rules)

10. The arbitral tribunal in *Hulley Enterprises Limited (Cyprus) v. The Russian Federation* noted that the substantive law applied by the tribunal also consisted of "principles of international law, including those authoritatively set out in the Articles on Responsibility of States for Internationally Wrongful Acts of the International Law Commission of the United Nations".[7]

European Court of Human Rights

11. In *Samsonov v. Russia*, the European Court of Human Rights stated that the State responsibility articles "ont codifié les principes dégagés par le droit

[5] ICSID Case No. ARB/06/3, Award, 6 May 2013, para. 189 (footnotes omitted).

[6] ICSID Case No. ARB/07/30, Decision on Jurisdiction and Merits, 3 September 2013, para. 339.

[7] UNCITRAL, PCA Case No. AA 226, Final Award 18 July 2014, para. 113, specifically citing articles 1-11, 28-39 and 49-54. Hereinafter the reference to *Hulley Enterprises Limited (Cyprus) v. The Russian Federation* includes the references to two largely identical awards (with the exception of the quantification of damages), *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, UNCITRAL, PCA Case No. AA 227, Final Award, 18 July 2014 and *Veteran Petroleum Limited (Cyprus) v. The Russian Federation*, UNCITRAL, PCA Case No. AA 228, Final Award, 18 July 2014.

international moderne concernant la responsabilité de l'Etat pour fait internationalement illicite".[8]

European Court of Human Rights

12. The European Court of Human Rights in *Liseytseva and Maslov v. Russia*, recognized the State responsibility articles and their commentaries as "codified principles developed in modern international law in respect of the State's responsibility for internationally wrongful acts".[9]

International arbitral tribunal (under the ICSID Convention)

13. In *Electrabel S.A. v. Republic of Hungary*, the arbitral tribunal referred to the State responsibility articles as a "codification of customary international law".[10]

Part One
The internationally wrongful act of a State

Chapter I
General principles

Article 1
Responsibility of a State for its internationally wrongful acts

International Tribunal for the Law of the Sea

14. In *The M/V "Virginia G" Case (Panama/Guinea-Bissau)*, the International Tribunal for the Law of the Sea noted that articles 1 and 31, paragraph 1, of the State responsibility articles reaffirmed that "every internationally wrongful act of a State entails the international responsibility of that State".[11] The Tribunal noted that the Seabed Disputes Chamber of the Tribunal, in its advisory opinion on *Responsibilities and Obligations of States with Respect to Activities in the Area*, had indicated the customary international law status of article 31,[12] and added that article 1 "also reflects customary international law".[13]

International arbitral tribunal (under the ICSID Convention)

15. The arbitral tribunal in *Gold Reserve Inc. v. Bolivarian Republic of Venezuela* agreed with the respondent that the State responsibility articles "primarily concern internationally wrongful acts against States, not individuals or other non-state actors, and some prominent commentators have warned against uncritical conflation of the two".[14]

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[8] ECHR, First Section, Application No. 2880/10, Decision, 16 September 2014, para. 45.
[9] ECHR, First Section, Application Nos. 39483/05 and 40527/10, Judgment, 9 October 2014, para. 128.
[10] ICSID Case No. ARB/07/19, Award, 25 November 2015, para. 7.60.
[11] ITLOS, Judgment, 14 April 2014, para. 429.
[12] ITLOS, Seabed Disputes Chamber, Advisory Opinion, 1 February 2011, para. 194.
[13] See note 11 above, para. 430.
[14] ICSID Case No. ARB(AF)/09/1, Award, 22 September 2014, para. 679.

International Tribunal for the Law of the Sea

16. In *Request for an advisory opinion submitted by the Sub-Regional Fisheries Commission*, the International Tribunal for the Law of the Sea found that articles 1, 2 and 31, paragraph 1 "are the rules of general international law relevant to the second question", namely to what extent the flag State shall be held liable for illegal, unreported and unregulated fishing activities conducted by vessels sailing under its flag.[15]

International arbitral tribunal (under the ICSID Convention)

17. In *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. The Argentine Republic*, the arbitral tribunal noted, based on the commentary to article 1, that "the term 'international responsibility' ... covers the new legal relations which arise under international law by the internationally wrongful act of a State".[16] It further observed that "Argentina, by reason of its international wrong in not respecting its obligations under the three BITs, is therefore subject to a new relationship toward the Claimants".[17]

International arbitral tribunal (under the ICSID Convention)

18. In *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia*, the arbitral tribunal noted that the principle enshrined in article 1, which is that States incur responsibility for their internationally wrongful acts, was "a basic principle of international law".[18]

Article 2[19]
Elements of an internationally wrongful act of a State

European Court of Human Rights

19. In *Likvidējamā P/S Selga and Lūcija Vasiļevska v. Latvia*, the European Court of Human Rights considered article 2 of the State responsibility articles and excerpts of the commentary thereto as relevant international law.[20] In assessing the responsibility of Latvia, the Court relied on article 2 to note that the two conditions of attribution of conduct and breach "form a cornerstone of State responsibility under international law".[21]

[15] ITLOS, Advisory Opinion, 2 April 2015, para. 144.
[16] ICSID Case No. ARB/03/19, Award, 9 April 2015, para. 25. Hereinafter this reference to *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. The Argentine Republic* includes the reference to the identical award in *AWG Group Ltd. v. The Argentine Republic*, UNCITRAL, Award, 9 April 2015.
[17] Ibid., para. 25.
[18] ICSID Case No. ARB/06/2, Award, 16 September 2015, para. 327.
[19] See also the *Request for an advisory opinion submitted by the Sub-Regional Fisheries Commission* referred to under article 1, *Jaloud v. The Netherlands* referred to under article 6, and *The Rompetrol Group N.V. v. Romania* referred to under article 31.
[20] ECHR, Fourth Section, Application Nos. 17126/02 and 24991/02, Decision, 1 October 2013, paras. 64-65.
[21] Ibid., para. 95.

Inter-American Court of Human Rights

20. In *Gutiérrez and Family v. Argentina*, the Inter-American Court of Human Rights referred to article 2 when recalling that "in order to establish that a violation of the rights embodied in the Convention has occurred, it is not necessary to determine, as under domestic criminal law, the guilt of the authors or their intentions, nor is it necessary to identify, individually, the agents to which the violations are attributed. It is sufficient that the State has an obligation that it has failed to comply with; in other words, that this unlawful act is attributed to it".[22]

International arbitral tribunal (under the ICSID Convention)

21. The arbitral tribunal in *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. The Argentine Republic* referred to article 2 as being "generally considered as a statement of customary international law".[23]

International arbitral tribunal (under the ICSID Convention)

22. In *Bernhard von Pezold and others v. Republic of Zimbabwe*, the arbitral tribunal noted that a "[b]reach of the BIT would be an internationally wrongful act within Article 2 of the ILC Articles as a 'breach of an international obligation', which can include treaty obligations".[24]

International arbitral tribunal (under the ICSID Convention)

23. In *Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey*, the arbitral tribunal, constituted to decide an application to annul the award, observed that article 2 of the State responsibility articles "codifies customary international law".[25]

Article 3
Characterization of an act of a State as internationally wrongful

Permanent Court of Arbitration (under UNCITRAL rules)

24. The arbitral tribunal in *Luigiterzo Bosca v. Lithuania* relied on article 3 to explain that it "ha[d] to base its conclusions on the substantive provisions of that Agreement [Between the Government of the Republic of Lithuania and the Government of the Italian Republic on the Promotion and Protection of Investments of 1994]".[26]

International arbitral tribunal (under the ICSID Convention)

25. The arbitral tribunal in *The Rompetrol Group N.V. v. Romania* cited article 3 and the commentary thereto when outlining "two elementary propositions: first, that it is well established that a breach of local law injuring a foreigner does not, in and of itself, amount to a breach of international law; second, that the provisions or

[22] Inter-American Court of Human Rights, Judgment, 25 November 2013, para. 78, note 163 (footnotes omitted).
[23] See note 16 above, para. 24.
[24] ICSID, Case No. ARB/10/15, Award, 28 July 2015, para. 722. See also the reference to article 2 in note 189 below.
[25] ICSID, Case No. ARB/11/28, Decision on Annulment, 30 December 2015, para. 183.
[26] UNCITRAL, PCA Case No. 2011-05, Award, 17 May 2013, para. 199.

requirements of local law cannot be advanced as an excuse for non-compliance with an international obligation".[27]

International arbitral tribunal (under the ICSID Convention)

26. In *Convial Callao S.A. and CCI v. Peru*, the arbitral tribunal cited article 3 when it indicated that "Es un principio bien establecido del derecho internacional, que se trate de la responsabilidad internacional del Estado o de la validez de normas o de figuras jurídicas de derecho interno en derecho internacional, que este último es independiente del primero cuando se trata de analizar la validez y el alcance internacionales del derecho interno o de los comportamientos estatales de carácter interno. Así, en el terreno de la responsabilidad, la violación de derecho interno no significa necesariamente que el derecho internacional resulte violado, y en el terreno de la validez de normas y figuras jurídicas internas en el derecho internacional, tampoco significa que aquellas gocen de plena validez en el derecho internacional y sean oponibles a terceros Estados".[28]

Inter-American Court of Human Rights

27. In *Case of the Ituango Massacres v. Colombia*, the Inter-American Court of Human Rights, in an order regarding compliance of the State with its previous judgment, referred to the State responsibility articles in conjunction with the principle codified in article 27 of the Vienna Convention on the Law of Treaties that "'a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty'".[29]

European Court of Human Rights

28. In *Anchugov and Gladkov v. Russia*, the European Court of Human Rights referred to article 3 and excerpts of the commentary thereto as relevant international law.[30]

Permanent Court of Arbitration (under UNCITRAL rules)

29. The arbitral tribunal, in *ECE Projektmanagement v. The Czech Republic*, noted that the principle that an unlawful act under domestic law does not necessarily mean that the act was unlawful under international law "forms part of the more general principle, recognised in Article 27 of the Vienna Convention on the Law of Treaties, and more generally in Article 3 of the ILC's Articles on the Responsibility of States for Internationally Wrongful Acts, that the characterisation of a given act as internationally wrongful is independent of its characterisation as lawful under the internal law of a State".[31] The arbitral tribunal further noted that, "[a]s indicated in the ILC's Commentary, the principle embodies two elements", first that only a breach of an international obligation can be characterized as internationally wrongful, and second, that a State cannot escape that characterization as

[27] See note 5 above, para. 174, note 299.
[28] ICSID Case No. ARB/10/2, Final Award, 21 May 2013, para. 405, note 427 (footnotes omitted).
[29] Inter-American Court of Human Rights, Order, 21 May 2013, para. 27, note 20 (quoting article 27 of the Vienna Convention on the Law of Treaties).
[30] ECHR, First Section, Application No. 11157/04, Judgment, 4 July 2013, para 37.
[31] UNCITRAL, PCA Case No. 2010-5, Award, 19 September 2013, para. 4.749.

internationally wrongful "'by pleading that its conduct conforms to the provisions of its internal law'".[32]

Inter-American Court of Human Rights

30. In *Gutiérrez and Family v. Argentina*, the Inter-American Court of Human Rights cited article 3 when "reiterat[ing] that, in cases such as this one, it must rule on the conformity of the State's actions with the American Convention".[33]

Inter-American Court of Human Rights

31. In its advisory opinion on *Rights and guarantees of children in the context of migration and/or in need of international protection*, the Inter-American Court of Human Rights, citing article 3, stated that its mandate "consists, essentially, in the interpretation and application of the American Convention or other treaties for which it has jurisdiction, in order to determine ... the international responsibility of the State under international law".[34]

International arbitral tribunal (under the ICSID Convention)

32. In *Perenco Ecuador Ltd. v. The Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)*, the arbitral tribunal noted, on the basis of the "well-established principle" recognized in article 3, that international law prevails in case of conflict with internal law.[35] It further noted that "under well-established principles of international law, as codified in Article 3 of the ILC Articles on State Responsibility, the fact that a law has been declared constitutional by the local courts, even by the highest court of the land, is not dispositive of whether it was in conformity with international law".[36]

International arbitral tribunal (under the ICSID Convention)

33. In *Vigotop Limited v. Hungary*, the arbitral tribunal, referring to article 3, agreed with the claimant's submission that "even though a finding that the termination violated the terms of the Concession Contract or provisions of Hungarian law may be relevant to its expropriation analysis, such a finding is neither necessary nor sufficient to conclude that Article 4 of the Treaty was violated".[37]

International Court of Justice

34. In *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, the International Court of Justice noted that "in either of these situations [of showing that genocide as defined in the Genocide Convention has been committed], the Court applies the rules of general international law on the responsibility of States for internationally wrongful acts. Specifically,

[32] Ibid., para. 4.750 (quoting para. (1) of the commentary to article 3).
[33] See note 22 above, note 242.
[34] Inter-American Court of Human Rights, Advisory Opinion, 19 August 2014, note 52 (footnotes omitted).
[35] ICSID Case No. ARB/08/6, Decision on Remaining Issues of Jurisdiction and on Liability, 12 September 2014, para. 534.
[36] *Ibid.*, para. *583*.
[37] ICSID Case No. ARB/11/22, Award, 1 October 2014, para. 327.

Article 3 of the ILC Articles on State Responsibility, which reflects a rule of customary law, states that '[t]he characterization of an act of a State as internationally wrongful is governed by international law'".[38]

Chapter II
Attribution of conduct to a State

General comments

Permanent Court of Arbitration (under UNCITRAL rules)

35. In *Hulley Enterprises Limited (Cyprus) v. The Russian Federation*, the arbitral tribunal noted "[t]he ILC Articles on State Responsibility are in point. ... Chapter II, 'Attribution of Conduct to a State,' in its introductory commentary, observes that, 'the general rule is that the only conduct attributed to the State at the international level is that of its organs of government, or of others who have acted under the direction, instigation or control of those organs, i.e., as agents of the State'".[39]

International arbitral tribunal (under the ICSID Convention)

36. In *Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey*, the arbitral tribunal "accept[ed] that the ILC Articles constitute a codification of customary international law with respect to the issue of attribution of conduct to the State and apply to the present dispute".[40] The ad hoc committee subsequently constituted to decide upon an application to annul the award in the case, noted that "[i]nternational law contains rules on attribution which the ILC codified and developed in Chapter II of its Articles on State Responsibility (Articles 4-11)".[41]

European Court of Human Rights

37. In *Tagayeva and Others v. Russia*, the European Court of Human Rights took note of the State responsibility articles, in particular of the principle stated in paragraph 3 of the commentary to chapter II, when indicating that "the conduct of private persons is not as such attributable to the State". As such, "human rights violations committed by private persons are outside of the Court's competence *ratione personae*".[42]

Article 4[43]
Conduct of organs of a State

Permanent Court of Arbitration (under UNCITRAL rules)

38. In *Chevron Corporation and Texaco Petroleum Corporation v. The Republic of Ecuador*, the arbitral tribunal confirmed and restated its Third Order on Interim

[38] International Court of Justice, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment of 3 February 2015, para. 128.
[39] See note above, para. 1466.
[40] ICSID, Case No. ARB/11/28, Award, 10 March 2014, para. 281.
[41] See note above, para. 184.
[42] ECHR, First Section, Application No. 26562, Decision, 9 June 2015, para. 581.
[43] See also *Valeri Belokon v. Kyrgyz Republic*, referred to under article 30.

Measures,[44] providing that "as a matter of international law, a State may be responsible for the conduct of its organs, including its judicial organs, as expressed in Chapter II of Part One [of the State responsibility articles] ... If it were established that any judgment made by an Ecuadorian court in the Lago Agrio Case was a breach of an obligation by the Respondent owed to the Claimants as a matter of international law, the Tribunal records that any loss arising from the enforcement of such judgment (within and without Ecuador) may be losses for which the Respondent would be responsible to the Claimants under international law, as expressed in Part Two of the International Law Commission's Articles on State Responsibility".[45]

International arbitral tribunal (under the ICSID Convention)

39. The arbitral tribunal in *Mr Franck Charles Arif v. Republic of Moldova* found "that as a matter of principle, in accordance with Article 4 of the ILC Articles on State Responsibility, court decisions can engage a State's responsibility, including for unlawful expropriation, without there being any requirement to exhaust local remedies (unless claims for denial of justice have been made)".[46]

International arbitral tribunal (under the ICSID Convention)

40. The arbitral tribunal in *The Rompetrol Group N.V. v. Romania* referred to articles 4 and 7 when affirming that "there was no dispute that all of the authorities and agencies in question were at all material times organs of the Romanian State, and that their conduct was accordingly attributable to the Romanian State for the purposes of the law of State responsibility".[47]

International arbitral tribunal (under the ICSID Convention)

41. In *TECO Guatemala Holdings LLC v. Republic of Guatemala*, the arbitral tribunal acknowledged, citing the text of article 4, that "[t]he conduct of a state organ such as the CNEE [National Commission of Electric Energy] is indeed attributable to the State".[48]

European Court of Human Rights

42. In *Jones and Others v. the United Kingdom*, the European Court of Human Rights referred to article 4 as relevant international law[49] and stated that the State responsibility articles "for their part, provide for attribution of acts to a State, on the basis that they were carried out ... by organs of the State as defined in Article 4".[50]

[44] UNCITRAL, PCA Case No. 2009-23, Third Order on Interim Measures, 28 January 2011, paras. 2-3.

[45] UNCITRAL, PCA Case No. 2009-23, Fourth Interim Award on Interim Measures, 7 February 2013, paras. 55 and 77.

[46] ICSID Case No. ARB/11/23, Award, 8 April 2013, para. 347.

[47] See note above, para. 173, note 298.

[48] ICSID Case No. ARB/10/23, Award, 19 December 2013, para. 479.

[49] ECHR, Fourth Section, Application Nos. 34356/06 and 40528/06, Judgment, 14 January 2014, para. 107.

[50] Ibid., para. 207.

International arbitral tribunal (under the ICSID Convention)

43. The arbitral tribunal in *Renee Rose Levy de Levi v. Republic of Peru* considered it "important to reproduce Article 4(1) of the International Law Commission's draft articles on Responsibility of States for Internationally Wrongful Acts".[51]

International arbitral tribunal (under the ICSID Convention)

44. In *Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey*, the arbitral tribunal quoted article 4, paragraph 2, which establishes that an "'organ includes any person or entity which has that status in accordance with the internal law of the State'".[52] The tribunal accepted the submission of the respondent "that there is no 'quasi-state' organ for the purposes of Art. 4".[53]

Permanent Court of Arbitration (under UNCITRAL rules)

45. In *Hulley Enterprises Limited (Cyprus) v. The Russian Federation*, the arbitral tribunal stated that the respondent's argument that the acts of a State organ were not in breach of the Energy Charter Treaty because it was acting only in a commercial capacity "runs up ... against the ILC Articles on State Responsibility". With reference to the text of article 4, the arbitral tribunal further explained that "[t]he commentary to this article specifies that '[i]t is irrelevant for the purposes of attribution that the conduct of a State organ may be classified as "commercial" or as "*acta iure gestionis*"'".[54]

African Court on Human and Peoples' Rights

46. The African Court on Human and Peoples' Rights in *Lohé Issa Konaté v. Burkina Faso* relied on article 4 as support for the finding that "the conduct of the Burkinabé courts fall[s] squarely on the Respondent State".[55]

European Court of Human Rights

47. In *Čikanović v. Croatia*, the European Court of Human Rights listed article 4 as relevant international law.[56] In stating that "[m]unicipalities are public-law entities which exercise public authority and whose acts or failures to act, notwithstanding the extent of their autonomy *vis-à-vis* the central organs, can engage the responsibility of the State under the Convention", the Court referred to the State responsibility articles, in particular article 4, as reflecting customary international law.[57]

International arbitral tribunal (under the ICSID Convention)

48. The arbitral tribunal in *Mr Hassan Awdi, Enterprise Business Consultants, Inc. and Alfa El Corporation v. Romania* determined that "AVAS' [Authority for State

[51] ICSID Case No. ARB/10/17, Award, 26 February 2014, para. 157.
[52] See note 40 above, para. 285 (quoting article 4).
[53] Ibid., para. 288.
[54] See note 7 above, para. 1479 (quoting para. (6) of the commentary to article 4).
[55] African Court on Human and Peoples' Rights, Application No. 004/2013, Judgment, 5 December 2014, para. 170, note 36 (quoting article 4).
[56] ECHR, First Section, Application No. 27630/07, Judgment, 5 February 2015, para. 37.
[57] Ibid., para. 53

Assets Recovery] acts under the Contract are attributable to the State under international law based on Article 4" of the State responsibility articles.[58]

Permanent Court of Arbitration (under UNCITRAL Rules)

49. In *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware Inc. v. Government of Canada*, the arbitral tribunal indicated with regard to articles 4 and 5 that "the ILC Articles quoted here are considered as statements of customary international law on the question of attribution for purposes of asserting the responsibility of a State towards another State, which are applicable by analogy to the responsibility of States towards private parties".[59] The tribunal observed that "[a] body that exercises impartial judgment, however, can well be an organ of the state; Article 4 of the ILC Articles, just quoted, specifically includes those exercising 'judicial' functions".[60] The tribunal further quoted the commentary to article 4 to explain that "'a state cannot avoid responsibility for the conduct of a body which does in truth act as one of its organs merely by denying it that status under its own law'".[61]

International arbitral tribunal (under the ICSID Convention)

50. The arbitral tribunal in *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. The Argentine Republic* cited article 4 of the State responsibility articles in concluding that the relevant wrongful acts, as "actions done by state organs, were clearly attributable to the Argentine State".[62]

International arbitral tribunal (under the ICSID Convention)

51. In *Bernhard von Pezold and others v. Republic of Zimbabwe*, the arbitral tribunal stated that "[i]t is clear under Article 4 of the ILC Articles and the Commentary thereon that organs of State include, for the purposes of attribution, the President, Ministers, provincial government, legislature, Central Bank, defence forces and the police, inter alia, as argued by the Claimants", and that "[r]esponsibility for the actions of these State organs is unlimited provided the act is performed in an official capacity (i.e. it includes *ultra vires* acts performed in an official capacity). Only acts performed in a purely private capacity would not be attributable".[63] The tribunal also noted that "indirect liability for the acts of others can also occur under Article 4 — for example, the failure to stop someone doing something that violated an obligation. It does not matter that a third party actually undertook the action, if a State organ (such as the police) was aware of it and did nothing to prevent it".[64]

Inter-American Court of Human Rights

52. In the *Case of Ruano Torres et. Al. v. El Salvador*, the Inter-American Court of Human Rights referred to the State responsibility articles in support of its assertion

[58] ICSID Case No. ARB/10/13, Award, 2 March 2015, para. 323.
[59] UNCITRAL, PCA Case No. 2009-04, Award on Jurisdiction and Liability, 17 March 2015, paras. 306-307.
[60] Ibid., para. 308.
[61] Ibid., para. 315 (quoting para. (11) of the commentary to article 4).
[62] See note 16 above, para. 25, note 14.
[63] See note 24 above, paras. 443-444.
[64] Ibid., para. 445.

that "en el diseño institucional de El Salvador, la Unidad de Defensoría Pública se inserta dentro de la Procuraduría General de la República y puede ser asimilada a un órgano del Estado, por lo que su conducta debe ser considerada como un acto del Estado en el sentido que le otorga el proyecto de artículos sobre responsabilidad del Estado por hechos internacionalmente ilícitos realizados por auxiliares de la administración de justicia".[65]

International arbitral tribunal (under the ICSID Convention)

53. The arbitral tribunal in *Adel A Hamadi Al Tamimi v. Sultanate of Oman* referenced article 4 as support for the assertion that the attribution of the conduct of State organs to the State is "broadly supported in international law".[66]

International arbitral tribunal (under the ICSID Convention)

54. In *Electrabel S.A. v. Republic of Hungary*, the arbitral tribunal referred to article 4 in finding that there was "no question that the acts of the Hungarian Parliament [were] attributable to the Hungarian State".[67]

International arbitral tribunal (under the ICSID Convention)

55. In *Tenaris S.A. and Talta — Trading e Marketing Sociedade Unipessoal Lda v. Bolivarian Republic of Venezuela*, the arbitral tribunal, "[o]n the basis of all the materials available to it ... concludes that CVG FMO [Ferrominera del Orinoco] is not an organ of the State for the purposes of ILC Article 4 of the ILC Articles".[68]

Article 5[69]
Conduct of persons or entities exercising elements of governmental authority

Permanent Court of Arbitration (under UNCITRAL rules)

56. The arbitral tribunal in *Luigiterzo Bosca v. Lithuania* concluded that "[t]he SPF [State Property Fund] is an entity empowered to exercise governmental authority, as described in Article 5" of the State responsibility articles. The question for the arbitral tribunal was thus "whether the SPF was acting in a sovereign capacity".[70]

European Court of Human Rights

57. The European Court of Human Rights in *Jones and Others v. the United Kingdom* referred to article 5 as relevant international law,[71] and noted that the acts of "persons empowered by the law of the State to exercise elements of the governmental authority and acting in that capacity, as defined in Article 5 of the Draft Articles" could be attributed to the State.[72]

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[65] Inter-American Court of Human Rights, Judgment, 5 October 2015, para. 160.
[66] ICSID, Case No. ARB/11/33, Award, 3 November 2015, para. 344, note 706.
[67] See note 10 above, para. 7.89.
[68] ICSID Case No. ARB/12/23, Award, 29 January 2016, paras. 412-413.
[69] See also *Liseytseva and Maslov v. Russia* referred to under article 8.
[70] See note 26 above, para. 127 (misnumbered).
[71] See note 49 above, paras. 107-109.
[72] Ibid., para. 207.

European Court of Human Rights

58. In *Samsonov v. Russia*, the European Court of Human Rights referred to article 5 of the State responsibility articles as relevant international law.[73]

Permanent Court of Arbitration (under UNCITRAL Rules)

59. In *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware Inc. v. Government of Canada*, the arbitral tribunal, relying on article 5, agreed with the investor's contention that even if the Joint Review Panel was not "an integral part of the government apparatus of Canada ... it is empowered to exercise elements of Canada's governmental authority".[74]

International arbitral tribunal (under the ICSID Convention)

60. The arbitral tribunal in *Dan Cake S.A. v. Hungary* considered that "it is not relevant to the question whether the *liquidator* is, pursuant to Article 5 of the ILC Draft Articles on State Responsibility, 'a person or entity ... which is empowered by the law of [the] State to exercise elements of the governmental authority'".[75]

Inter-American Court of Human Rights

61. In *Gonzales Lluy et al. v. Ecuador*, the Inter-American Court of Human Rights cited the case of *Ximenes Lopes v. Brazil*, noting that in that case the Court had "indicated that the assumptions of State responsibility for violation of rights established in the Convention may include the conduct described in the Resolution of the International Law Commission, 'of a person or entity that, although not a State body, is authorized by the laws of the State to exercise powers entailing the authority of the State. Such conduct, by either a natural or legal person, must be deemed to be an act of the State, provided that the latter was acting in this capacity'".[76]

International arbitral tribunal (under the ICSID Convention)

62. In *Adel A Hamadi Al Tamimi v. Sultanate of Oman*, the arbitral tribunal noted that article 5 "provides a useful guide as to the dividing line between sovereign and commercial acts".[77]

International arbitral tribunal (under the ICSID Convention)

63. The arbitral tribunal in *Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey* stated that as regards attribution of the conduct of Emlak to Turkey under article 5 "it must be established both that (1) Emlak is empowered by the law of Turkey to exercise elements of governmental authority; and (2) The conduct by Emlak that the Claimant complains of relates to the exercise of that governmental authority".[78]

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[73] See note 8 above, paras. 30-32 for further references to the State responsibility articles.

[74] See note 59 above, para. 308. See also the reference to article 5 in note 59 above.

[75] ICSID Case No. ARB/12/9, Decision on Jurisdiction and Liability, 24 August 2015, para. 158 (quoting article 5).

[76] Inter-American Court of Human Rights, Judgment, 1 September 2015, note 205 (quoting *Case of Ximenes Lopes v. Brazil, Merits, reparation and costs*, Judgment, 4 July, 2006, para. 86).

[77] See note 66 above, para. 324.

[78] See note 40 above, para. 292.

International arbitral tribunal (under the ICSID Convention

64. In *Tenaris S.A. and Talta — Trading e Marketing Sociedade Unipessoal Lda v. Bolivarian Republic of Venezuela*, the arbitral tribunal considered the question "whether CVG FMO [Ferrominera del Orinoco] was empowered by Venezuela to exercise elements of governmental authority, and was so acting in the case of the Supply Contract, and, specifically, the discriminatory supply of pellets, such that its actions might be attributed to Venezuela pursuant to Article 5 of the ILC Articles".[79]

Article 6
Conduct of organs placed at the disposal of a State by another State

European Court of Human Rights

65. The European Court of Human Rights in *Jaloud v. The Netherlands* cited articles 2, 6 and 8 of the State responsibility articles, as well as the respective commentaries, as relevant international law.[80] In establishing jurisdiction in respect of the Netherlands, the Court could not find that "the Netherlands' troops were placed 'at the disposal' of any foreign power, whether it be Iraq or the United Kingdom or any other power, or that they were 'under the exclusive direction or control' of any other State (compare, *mutatis mutandis*, Article 6 of the International Law Commission's Articles on State Responsibility".[81]

International arbitral tribunal (under the ICSID Convention)

66. In *Electrabel S.A. v. Republic of Hungary*, the arbitral tribunal stated that "[w]hilst the European Union is not a State under international law, in the Tribunal's view, it may yet by analogy be so regarded as a Contracting Party to the ECT, for the purpose of applying Article 6 of the ILC Articles in the present case".[82]

Article 7[83]
Excess of authority or contravention of instructions

European Court of Human Rights

67. In *Jones and Others v. the United Kingdom*, the European Court of Human Rights referred to article 7 as relevant international law.[84]

European Court of Human Rights

68. In *Husayn (Abu Zubaydah) v. Poland*, the European Court of Human Rights listed articles 7, 14, 15 and 16 as relevant international law.[85]

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[79] See note 68 above, para. 414.
[80] ECHR, Grand Chamber, Application No. 47708/08, Judgment, 20 November 2014, para. 98.
[81] Ibid., para. 151.
[82] See note 10 above, para. 6.74.
[83] See also *The Rompetrol Group N.V. v. Romania* referred to under article 4, and *Al Nashiri v. Poland* referred to under article 16.
[84] See note 49 above, para. 108.
[85] ECHR, Former Fourth Section, Application No. 7511/13, Judgment, 24 July 2014, para. 201.

Article 8[86]
Conduct directed or controlled by a State

Permanent Court of Arbitration (under UNCITRAL rules)

69. The arbitral tribunal in *Hulley Enterprises Limited (Cyprus) v. The Russian Federation* recited the text of article 8 and noted that "[t]he commentary to Article 8 observes that: 'Questions arise with respect to the conduct of companies or enterprises which are State owned and controlled ... The fact that the State initially establishes a corporate entity ... is not a sufficient basis for the attribution to the State of the subsequent conduct of that entity. ... Since corporate entities, although owned by and in that sense subject to the control of the State, are considered to be separate, *prima facie* their conduct in carrying out their activities is not attributable to the State unless they are exercising elements of governmental authority ... [and] the instructions, direction or control [of the State] must relate to the conduct which is said to have amounted to an internationally wrongful act'".[87]

European Court of Human Rights

70. In *Samsonov v. Russia*, the European Court of Human Rights considered article 8, and the commentary thereto, as relevant international law.[88] In assessing whether the conduct of a company could be attributed to the State, the Court held that "[l]a Cour doit examiner de manière effective le contrôle que l'État a excercé dans les circonstances de l'espèce. De l'avis de la Cour, cette approche est conforme tant à sa jurisprudence antérieure ... qu'à l'interprétation donnée par la CDI à l'article 8 des articles sur la responsabilité de l'État".[89]

European Court of Human Rights

71. In *Liseytseva and Maslov v. Russia*, the European Court of Human Rights listed article 5 and the text and commentary to article 8, as relevant international law.[90] The Court also observed that the question of the independence of the municipalities was to be determined with regard to the actual factual manner of the control exerted over them by the State in the particular case, noting that "this approach is consistent with the ILC's interpretation of the aforementioned Article 8 of the Articles on State Responsibility".[91]

International arbitral tribunal (under the ICSID Convention)

72. In *Lao Holdings N.V. v. Lao People's Democratic Republic*, the arbitral tribunal referred to the commentary to article 8 in support of the proposition that "a minority shareholding in a corporation is not sufficient in international law (as well as domestic law), of itself, to attribute the acts of a corporation to its shareholders.

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[86] See also *Jaloud v. The Netherlands* referred to under article 6, and *Valeri Belokon v. Kyrgyz Republic* referred to under article 30.

[87] See note 7 above, para. 1466 (quoting para. (6) of the commentary to article 8).

[88] See note 8 above, paras. 30-32 for further references to the State responsibility articles.

[89] Ibid., para. 73.

[90] See note 9 above, para. 128.

[91] Ibid., para. 205 (see also para. 130, in which the Court refers to ECHR, Grand Chamber, *Kotov v. Russia*, Application No. 54522/00, Judgment, 3 April 2012, paras. 30-32 for a summary of other relevant provisions of the State responsibility articles).

The result is no different where the minority shareholder is a Government".[92] It also partly relied on article 8 in finding that "corporate acts may be attributed to the Government if the Government directs and controls the corporation's activities".[93]

International arbitral tribunal (under the ICSID Convention)

73. In *Bernhard von Pezold and others v. Republic of Zimbabwe*, the arbitral tribunal held that the simple encouragement of private persons by the Government, without evidence of a direct order or control, "would not meet the test set out in Article 8".[94]

International arbitral tribunal (under the ICSID Convention)

74. In *Adel A Hamadi Al Tamimi v. Sultanate of Oman*, the arbitral tribunal observed that the State responsibility articles "set out a number of grounds on which attribution may be based. The ILC Articles suggest that responsibility may be imputed to a State where the conduct of a person or entity is closely directed or controlled by the State, although the parameters of imputability on this basis remain the subject of debate".[95]

International arbitral tribunal (under the ICSID Convention)

75. The arbitral tribunal in *Electrabel S.A. v. Republic of Hungary* relied on the commentary to article 8 to observe that "the fact that a State acts through a State-owned or State-controlled company over which it exercises some influence is by itself insufficient for the acts of such entities to be attributed to the State".[96] The tribunal stated that an "invitation to negotiate cannot be assimilated to an instruction" in the sense of article 8, which would have allowed for the attribution of conduct of the company in question to Hungary.[97] Referring to article 8, the tribunal also found that Hungary did not use "'its ownership interest in or control of a corporation specifically in order to achieve a particular result'".[98]

International arbitral tribunal (under the ICSID Convention)

76. The arbitral tribunal in *Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey* stated that "[p]lainly, the words 'instructions', 'direction' and 'control' in Art. 8 are to be read disjunctively. Therefore, the arbitral tribunal need only be satisfied that one of those elements is present in order for there to be attribution under Art. 8".[99] The tribunal accepted the respondent's submission that the relevant test was that of "effective control".[100] It confirmed "that it is insufficient for the purposes of attribution under Art 8 to establish merely that

[92] ICSID Case No. ARB(AF)/12/6, Decision on the Merits, 10 June 2015, para. 81.
[93] Ibid., para. 82.
[94] See note 24 above, para. 448.
[95] See note 66 above, note 673 (quoting para. (6) of the commentary to article 8) (footnote omitted).
[96] See note 10 above, para. 7.95 (see also paras. 7.63-7.71, quoting article 8 and the commentary in detail).
[97] Ibid. para. 7.111.
[98] Ibid., para. 7.137 (quoting para. (6) of the commentary to article 8).
[99] See note 40 above, para. 303.
[100] Ibid., para. 304.

Emlak was majority-owned by TOKI, *i.e.*, a part of the State".[101] The tribunal further noted that for attribution of conduct under article 8, there must be "proof that the State used its control as a vehicle directed towards achieving a particular result in its sovereign interests".[102] The ad hoc committee subsequently constituted to decide on the annulment of the award confirmed this interpretation with reference to the commentary to article 8.[103]

Article 10
Conduct of an insurrectional or other movement

International Court of Justice

77. In *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)* the International Court of Justice "consider[ed] that, even if Article 10(2) of the ILC Articles on State Responsibility could be regarded as declaratory of customary international law at the relevant time, that Article is concerned only with the attribution of acts to a new State; it does not create obligations binding upon either the new State or the movement that succeeded in establishing that new State. Nor does it affect the principle stated in Article 13 of the said Articles".[104]

Article 11
Conduct acknowledged and adopted by a State as its own

Permanent Court of Arbitration (under UNCITRAL rules)

78. In *Luigiterzo Bosca v. Lithuania*, the arbitral tribunal, paraphrasing article 11, stated that "[i]n other words, where the State endorses the act, as here, the State is subject to international responsibility under international law".[105]

Permanent Court of Arbitration (under UNCITRAL Rules)

79. In *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware Inc. v. Government of Canada*, the tribunal found that "[o]n the facts of the present case, however, Article 11 would establish the international responsibility of Canada even if the JRP [Joint Review Panel] were not one of its organs".[106] The arbitral tribunal specified that "[t]here is no indication in the evidence of a level of independent fact-finding, legal analysis or other deliberation by the Government of Canada that would be inconsistent with the view that Canada was acknowledging and adopting the essential reasoning and conclusions of the JRP".[107]

[101] Ibid., para. 306 (quoting para. (6) of the commentary to article 8).
[102] Ibid., para. 326.
[103] See note 25 above, paras. 187-189.
[104] See note 38 above, para. 104.
[105] See note 26 above, note 114.
[106] See note 59 above, paras. 321-322.
[107] Ibid., para. 323.

International arbitral tribunal (under the ICSID Convention)

80. In *Bernhard von Pezold and others v. Republic of Zimbabwe*, the arbitral tribunal did not find that article 11 of the State responsibility articles was applicable in the case.[108]

Chapter III
Breach of an international obligation

Article 12
Existence of a breach of an international obligation

International arbitral tribunal (under the ICSID Convention)

81. In *ConocoPhillips Petrozuata B.V., and others v. Bolivarian Republic of Venezuela*, the arbitral tribunal cited the commentary to article 12 when considering that "a breach of obligation does not occur until the law in issue is actually applied in breach of that obligation and that cannot happen before the law in question is in force".[109]

Special Tribunal for Lebanon

82. In *The Prosecutor v. Salim Jamil Ayyash et al.*, the Special Tribunal for Lebanon referred to article 12 and the pertinent commentary in explaining that "the standard for determining a State's non-compliance may be objective" but "[i]nterpretation, obviously, depends upon the circumstances".[110]

Article 13[111]
International obligation in force for a State

African Commission on Human and Peoples' Rights

83. In *Al-Asad v. Djibouti*, the African Commission on Human and Peoples' Rights referred to article 13 as a "simple and well-articulated" principle.[112]

International arbitral tribunal (under the ICSID Convention)

84. The arbitral tribunal in *Renee Rose Levy and Gremcitel S.A. v. Republic of Peru* cited article 13 in support of "the principle of non-retroactivity of treaties".[113]

International arbitral tribunal (under the ICSID Convention)

85. In *Ping An Life Insurance Company, Limited and Ping An Insurance (Group) Company Limited v. The Government of Belgium*, the arbitral tribunal cited article 13 as codifying the "general principle (perhaps more accurately described as a

[108] See note 24 above, para. 449.
[109] See note 6 above, para. 289, note 308.
[110] Special Tribunal For Lebanon (STL-11-01), Decision on Updated Request for a Finding of Non-Compliance, 27 March 2015, paras. 43-45.
[111] See also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)* referred to under article 10.
[112] African Commission on Human and Peoples' Rights, Communication 383/10, Ruled Inadmissible, 12 May 2014, para. 130.
[113] ICSID Case No. ARB/11/17, Award, 9 January 2015, para. 147, note 170.

presumption) of non-retroactivity of treaties".[114] More specifically, the tribunal relied on article 13 in support of its view that "the substantive provisions of a BIT may not be relied on in relation to acts and omissions occurring before its entry into force (unless they are continuing or composite acts) even where (as here) the BIT applies to investments made prior to the entry into force of the BIT, or where the dispute arose after the entry into force of the BIT".[115]

International arbitral tribunal (under the ICSID Convention)

86. In *Adel A Hamadi Al Tamimi v. Sultanate of Oman*, the arbitral tribunal noted that "Article 13 of the ILC Articles on State Responsibility confirms that an act of State will not constitute a breach of an international obligation unless the State is bound by the obligation in question at the time the act occurs".[116]

Article 14[117]
Extension in time of the breach of an international obligation

Inter-American Court of Human Rights

87. In *Case of Rivera and Family Members v. Peru*, the Inter-American Court of Human Rights cited article 14 in support of the statement that "[o]wing to their characteristics, once the treaty enters into force, those continuing or permanent acts which persist after that date can generate international obligations for the State party, without this signifying a violation of the principle of the non-retroactivity of treaties".[118] The Court continued by explaining that it "ha[d] already established that it is competent to examine violations of a continuing or permanent nature that commenced before the defendant State had accepted the Court's contentious jurisdiction, and that persist following this acceptance, because they continue to be committed and, thus, the principle of non-retroactivity is not infringed".[119]

International arbitral tribunal (under the ICSID Convention)

88. The arbitral tribunal in *Cervin Investissements S.A. and Rhone Investissements v. Republic of Costa Rica* referred to article 14 in support of its assertion that "[l]a responsabilidad internacional del Estado debe en efecto apreciarse a la fecha en la cual ha sido cometido el hecho generador de su responsabilidad".[120]

International arbitral tribunal (under the ICSID Convention)

89. In *Adel A Hamadi Al Tamimi v. Sultanate of Oman*, the arbitral tribunal relied on the commentary to article 14 as supporting the view that "'[a]n act does not have

[114] ICSID Case No. ARB/12/29, Award, 30 April 2015, paras. 168-169.
[115] Ibid., para. 172.
[116] See note 66 above, para. 395.
[117] See also *Husayn (Abu Zubaydah) v. Poland* referred to under article 7, and *Al Nashiri v. Poland* referred to under article 16.
[118] Inter-American Court of Human Rights, Judgment, 26 November 2013, para. 30.
[119] Ibid., para. 32, referring to Inter-American Court of Human Rights, *Case of the Serrano Cruz Sisters v. El Salvador, Preliminary objections*, Judgment, 23 November 2004, paras. 65-66, and Inter-American Court of Human Rights, *Case of Radilla Pacheco v. Mexico, Preliminary Objections, merits, reparations and costs*, Judgment, 23 November 2009, para. 24.
[120] ICSID Case No. ARB/13/2, Decision on Jurisdiction 15 December 2014, para. 278.

a continuing character merely because its effects or consequences extend in time'".[121]

Article 15[122]
Breach consisting of a composite act

Ad hoc committee (under the ICSID Convention)

90. The ad hoc committee in *El Paso Energy International Company v. The Argentine Republic*, noted that the arbitral tribunal, basing itself, inter alia, on article 15, had exposed the substance of the problem that led to its reasoning and decision, namely "that the cumulative effect of a series of measures which might be inoffensive and legal one by one may alter the global situation and the legal framework in a way that the investor could not have legitimately expected".[123]

Chapter IV
Responsibility of a State in connection with the act of another State

Article 16[124]
Aid or assistance in the commission of an internationally wrongful act

European Court of Human Rights

91. In *Al Nashiri v. Poland*, the European Court of Human Rights referred to articles 7, 14, 15 and 16 as relevant international law.[125]

Chapter V
Circumstances precluding wrongfulness

Article 20
Consent

World Trade Organization Appellate Body

92. In *Peru — Additional Duty on Imports of Certain Agricultural Products*, the Appellate Body of the WTO noted that "without reaching the questions of whether the ... ILC Articles 20 and 45 are 'rules of international law applicable in the relations between the parties' within the meaning of Article 31(3)(c) of the Vienna Convention ..., we disagree with Peru that the ... ILC Articles 20 and 45 are 'relevant' rules of international law within the meaning of Article 31(3)(c)".[126] The Appellate Body thus found that "[h]aving concluded that the ... ILC Articles 20 and 45 are not 'relevant' to the interpretation of Article 4.2 of the Agreement on Agriculture and Article II:1(b) of the GATT 1994 within the meaning of Article

[121] See note 66 above, para. 417, note 850 (quoting para. (6) of the commentary to article 14).
[122] See also *Husayn (Abu Zubaydah) v. Poland* referred to under article 7 and *Al Nashiri v. Poland* referred to under article 16.
[123] ICSID Case No. ARB/03/15 Decision of the Ad Hoc Committee on the Application for Annulment of the Argentine Republic, 22 September 2014, para. 284.
[124] See also *Husayn (Abu Zubaydah) v. Poland* referred to under article 7.
[125] ECHR, Former Fourth Section, Application No. 28761/11, Judgment, 24 July 2014, para. 207.
[126] WTO, Appellate Body Report, WT/DS457/AB/R and Add. 1, 20 July 2015, para. 5.104 (as restated in paras. 5.118 and 6.4).

31(3)(c) of the Vienna Convention..., there is no need for us to address whether the ... ILC Articles 20 and 45 are 'rules of international law applicable in the relations between the parties', or the meaning of the term 'parties' in both Article 31(3)(a) and (c) of the Vienna Convention".[127]

Article 25
Necessity

Ad hoc committee (under the ICSID Convention)

93. In *Impregilo S.p.A. v. Argentine Republic*, the ad hoc committee constituted to hear Argentina's application for annulment of the award found that, in considering, inter alia, article 25 of the State responsibility articles, the arbitral tribunal had "based its decision on several solid sources".[128]

Ad hoc committee (under the ICSID Convention)

94. The ad hoc committee in *El Paso Energy International Company v. The Argentine Republic*, noted that "[i]n paragraphs 621 to 623 [the arbitral tribunal] stated what other rules of the ILC's Draft Articles and the Unidroit Principles provide on the exclusion of liability and the degree of contribution to a state of necessity",[129] and concluded that the arbitral tribunal's analysis "was clear ...; it stated reasons and explained amply the decisions taken on this issue".[130]

International arbitral tribunal (under the ICSID Convention)

95. In *Bernhard von Pezold and others v. Republic of Zimbabwe*, the arbitral tribunal stated that "the international law analysis [under Article 25 of the ILC Articles] is not affected by the domestic test which gives rise to a state of emergency. Accordingly, a domestic declaration of a state of emergency can only serve as evidence of a state of emergency that may give rise to a necessity defence under international law".[131]

Article 26
Compliance with peremptory norms

International arbitral tribunal (under the ICSID Convention)

96. In *Bernhard von Pezold and others v. Republic of Zimbabwe*, the arbitral tribunal found that "Zimbabwe's violation of its obligation *erga omnes* means that it has breached ILC Article 26 and is therefore precluded from raising the necessity defence in relation to any events upon which the FTLRP [Fast Track Land Reform Programme] policy touches".[132]

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[127] Ibid., para. 5.105 (as restated in paras. 5.118 and 6.4)
[128] ICSID Case No. ARB/07/17, Decision of the ad hoc Committee on the Application for Annulment, 24 January 2014, para. 203.
[129] See note 123 above, para. 254 (emphasis omitted).
[130] Ibid., para. 256.
[131] See note 24 above, para. 624.
[132] Ibid., para. 657.

Part Two
Content of the international responsibility of a State

Chapter I
General principles

Article 28
Legal consequences of an internationally wrongful act

International arbitral tribunal (under the ICSID Convention)

97. The arbitral tribunal in *Ioan Micula and others v. Romania*, recognized with reference to the commentary to article 28 that "the legal consequences of internationally wrongful acts, may not apply, at least directly, to cases involving persons or entities other than States".[133] However, the tribunal further emphasized that "the ILC Articles reflect customary international law in the matter of State responsibility, and to the extent that a matter is not ruled by the treaties applicable to this case and that there are no circumstances commanding otherwise, the Tribunal will turn to the ILC Articles for guidance".[134]

International arbitral tribunal (under the ICSID Convention)

98. In *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia*, while considering the applicability of Part Two of the State responsibility articles to investor-State disputes, the arbitral tribunal noted that "the ILC Articles restate customary international law and its rules on reparation have served as guidance to many tribunals in investor-State disputes".[135] This is despite the fact that, according to the commentary to article 28, Part Two "'does not apply to obligations of reparation to the extent that these arise towards or are invoked by a person or entity other than a State'".[136]

Article 30
Cessation and non-repetition

International arbitral tribunal (under UNCITRAL rules)

99. In *Valeri Belokon v. Kyrgyz Republic*, the arbitral tribunal noted that, while it had "been directed to the ILC Articles on State Responsibility with regards to questions of attribution (Articles 4 and 8), no reference appears to have been made to this Tribunal's authority to grant Satisfaction (Article 37) or Assurances (Article 30) of the form requested".[137] It therefore held that its authority to grant the requested relief under international law had "not been sufficiently established" and so declined to grant it.[138]

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[133] ICSID Case No. ARB/05/20, Award, 11 December 2013, note 172.
[134] Ibid., note 172.
[135] See note 18 above, para. 555.
[136] Ibid., para. 555 (quoting para. (3) of the commentary to article 28).
[137] UNCITRAL, Award, 24 October 2014, para. 275.
[138] Ibid., para. 276.

Article 31[139]
Reparation

International arbitral tribunal (under the ICSID Convention)

100. In *Mr Franck Charles Arif v. Republic of Moldova*, the arbitral tribunal cited article 31 as reflecting the "general obligation of a State guilty of an internationally wrongful act to make reparation".[140]

International arbitral tribunal (under the ICSID Convention)

101. The arbitral tribunal constituted to hear *The Rompetrol Group N.V. v. Romania* case discussed article 31 as follows:

> "While the Tribunal cannot fault the Claimant's submission that, under the draft Articles, breach of an international obligation has wider consequences than the duty to pay damages, it notes (subject to what will appear later) that, in its final form, the Claimant's claim is primarily a claim for damages. The crux therefore lies in draft Article 31, and specifically the ILC's commentary to that article (read together with its commentary to draft Article 2). In both places, the ILC states clearly that there is no general rule requiring damage as a constituent element of an international wrong giving rise to State responsibility. The ILC goes on to say that whether damage is or is not actually required depends on the nature of the primary obligation that has been breached. Moreover the ILC goes on to make explicit that its formulation of the rule in terms of an automatic obligation borne by the wrongful State is designed to side-step the problems that would otherwise be caused by the possible existence of more than one State 'specially affected by the breach,' the latter being a phrase repeatedly used in the draft Articles, along with the expression 'injured State,' to express the idea of a State which has suffered damage in some direct sense sufficient to entitle it to 'invoke the responsibility of' the wrongful State. ... Transposing the above from the State-to-State to the investment treaty context leads, in the Tribunal's opinion, to the following conclusions. The starting point, as the ILC points out, is the nature of the particular international obligation (the 'primary obligation') breach of which is being invoked."[141]

102. The tribunal further cited article 31 to support the statement that "[i]n general international law ... the award of moral damages is certainly accepted".[142]

International arbitral tribunal (under the ICSID Convention)

103. The arbitral tribunal in *Ioan Micula and others v. Romania* cited article 31 and the commentary thereto, as emphasizing the principle that there is a "need for a causal link between the internationally wrongful act and the injury for which compensation is due".[143] In relation to the directness of the causal link, the tribunal further "note[d] that under the ILC Articles not every event subsequent to the

[139] See also the *Request for an advisory opinion submitted by the Sub-Regional Fisheries Commission* referred to under article 1.
[140] See note 46 above, para. 559.
[141] See note 5 above, paras. 189-190, also referring to Part III of the State responsibility articles in note 314 (footnotes omitted).
[142] Ibid., para. 289.
[143] See note 133 above, para. 923.

wrongful act and antecedent to the occurrence of the injury will necessarily break the chain of causation and qualify as an intervening cause".[144]

International Tribunal for the Law of the Sea

104. The International Tribunal for the Law of the Sea in *The M/V "Virginia G" Case (Panama/Guinea-Bissau)* observed that article 31, paragraph 1 provided that "'[t]he responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act'".[145]

Permanent Court of Arbitration (under UNICTRAL rules)

105. In *Enkev Beheer B.V. v. Republic of Poland*, the arbitral tribunal "derived no decisive assistance from Article 31 of the International Law Commission's Articles on State Responsibility and its Commentary", because "[c]ompensation for unlawful expropriation may entail more than compensation for lawful expropriation".[146]

Permanent Court of Arbitration (under UNCITRAL rules)

106. In *Hulley Enterprises Limited (Cyprus) v. The Russian Federation*, the arbitral tribunal noted that it will "assess damages in the light of the foregoing accepted principles of international law",[147] including articles 31, 36 and 39. In assessing contributory fault, the tribunal, quoting the commentary to article 31, stated that "'[i]t is true that cases can occur where an identifiable element of injury can properly be allocated to one of several concurrently operating causes alone. But unless some part of the injury can be shown to be severable in causal terms from that attributed to the responsible State, the latter is held responsible for all the consequences, not being too remote, of its wrongful conduct'".[148] In relation to the quantification of damage in cases of multiple causes for the same damage, the tribunal also cited the commentary to article 31, emphasizing that "as the commentary makes clear, the mere fact that damage was caused not only by a breach, but also by a concurrent action that is not a breach does not, as such, interrupt the relationship of causation that otherwise exists between the breach and the damage. Rather, it falls to the Respondent to establish that a particular consequence of its actions is severable in causal terms (due to the intervening actions of Claimants or a third party) or too remote to give rise to Respondent's duty to compensate."[149]

International arbitral tribunal (under the ICSID Convention)

107. The arbitral tribunal in *Gold Reserve Inc. v. Bolivarian Republic of Venezuela* noted that the principles found in the State responsibility articles, and particularly in article 31 "to make full reparation for injury caused through violating an international obligation an international obligation",[150] reflect customary international law.

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[144] Ibid., para. 925, referring to comments 12 and 13 to article 31.

[145] See note 11 above, para. 429 (quoting article 31). See also the reference to article 31 in note 11 above.

[146] PCA Case No. 2013-01, First Partial Award, 29 April 2014, para. 363.

[147] See note 7 above, para. 1593.

[148] Ibid., para. 1598 (quoting para. (13) of the commentary to article 31).

[149] Ibid., para. 1775.

[150] See note 14 above, para. 679.

International arbitral tribunal (under the ICSID Convention)

108. In *Flughafen Zurich A.G. and Gestión Ingeniería IDC S.A. v. Bolivarian Republic of Venezuela*, the arbitral tribunal cited, inter alia, the State responsibility articles in support of the proposition that it "[e]s un principio firme del Derecho internacional consuetudinario que la víctima de un acto ilícito perpetrado por un Estado tiene derecho a recibir una reparación íntegra, como si el acto ilícito no hubiera ocurrido".[151]

Permanent Court of Arbitration (under UNCITRAL rules)

109. The arbitral tribunal, in *British Caribbean Bank Limited v. The Government of Belize*, considered that "[i]n the absence of an applicable provision within the Treaty itself, establishing the standard of compensation as a matter of *lex specialis*, the applicable standard of compensation is that existing in customary international law, as set out by the Permanent Court of International Justice in the *Factory at Chorzów*" and articles 31, 34 and 35 of the Articles of State Responsibility, as cited by the tribunal.[152]

110. The arbitral tribunal also noted that "the approach it has taken in the application of the *Chorzów Factory* standard and the ILC Articles on State Responsibility to provide the Claimant with full reparation calls for the Tribunal to place the Claimant in the circumstances in which it would have found itself, but for the unlawful act. The Tribunal considers that this logic leads to the application of the regular rate of interest under the contract, rather than the penalty rate".[153]

International arbitral tribunal (under the ICSID Convention)

111. The arbitral tribunal in *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. The Argentine Republic*, noted that, as per article 31, a State is responsible for the full reparation for any damage caused by its internationally wrongful act and there must be a causal link between the internationally wrongful act and the injury for which reparation is claimed. "If such a link exists, then Argentina is required to make 'full reparation' for the injury it has caused".[154]

African Court on Human and Peoples' Rights

112. In *Beneficiaries of Late Norbert Zongo, Abdoulaye Nikiema Alias Ablasse, Ernest Zongo and Blaise Ilboudo & the Burkinabe Human and Peoples' Rights Movement v. Burkina Faso*, the African Court on Human and Peoples' Rights referred to article 31, paragraph 1 of the State responsibility articles,[155] noting that "in accordance with international law, for reparation to accrue, there must be a causal link between the wrongful act that has been established and the alleged prejudice".[156] The Court explained that "Article 31(2) of the Draft Articles on Responsibility of States mentioned above indeed refers to a 'prejudice ... resulting

[151] ICSID Case No. ARB/10/19, Award 18 November, 2014, para. 746.
[152] UNCITRAL, PCA Case No. 2010-18, Award, 19 December 2014, paras. 287-291.
[153] Ibid., para. 299.
[154] See note 16 above, para. 26 (quoting article 31).
[155] African Court on Human and Peoples' Rights, Application No. 013/2011, Judgment on Reparations, 5 June 2015, para. 21.
[156] Ibid., para. 24.

from an internationally wrongful act'".[157] The Court cited article 31, paragraph 2 in support of the statement that "according to international law, both material and moral damages have to be repaired".[158]

International arbitral tribunal (under the ICSID Convention)

113. In *Bernhard von Pezold and others v. Republic of Zimbabwe*, the arbitral tribunal, referring to article 31, paragraph 1, observed that "the ILC Articles confirm restitution as the principal form of reparation in international law".[159] The tribunal further cited article 31 and the accompanying commentary in noting that "[a] State's obligation to provide reparation for an 'injury' may include moral damage, as well as material damage". Such "moral damages include 'such things as individual pain and suffering, loss of loved ones or personal affront associated with an intrusion on one's home or private life' .... Nevertheless, moral damages will be awarded only in exceptional circumstances".[160]

International arbitral tribunal (under the ICSID Convention)

114. In *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia*, the arbitral tribunal noted that compensation for unlawful expropriation is "governed by the full reparation principle as articulated by the PCIJ in the *Chorzów* case and later expressed in the ILC Articles",[161] and cited the text of article 31 in support of the principle that a "responsible state must repair the damage caused by its internationally wrongful act".[162]

International arbitral tribunal (under the ICSID Convention)

115. The arbitral tribunal in *Hrvatska Elektroprivreda d.d. v. Republic of Slovenia* indicated that, "[t]aken together, Article 31(1) and the *Chorzów Factory* decision require that [the Claimant] be placed in the same situation 'which would, in all probability, have existed'" had the internationally unlawful act not been committed "while also providing 'damages for loss sustained'".[163] The tribunal found that "consistent with the above principles, the preferred approach to calculate the X factor is the replacement cost approach. The focus compelled by Article 31 and the *Chorzów Factory* decision is on the loss suffered to the harmed party".[164]

Article 32
Irrelevance of internal law

Inter-American Court of Human Rights

116. In an order in the *Case of Gelman v. Uruguay*, the Inter-American Court of Human Rights cited the State responsibility articles in support of the assertion that

[157] Ibid., para. 24.
[158] Ibid., para. 26.
[159] See note 24 above, para. 684. See also the reference to article 31 in note 177 below.
[160] Ibid., para. 908 (quoting para. (5) of the commentary to article 31).
[161] See note 18 above, para. 326.
[162] Ibid., para. 327.
[163] ICSID Case No. ARB/05/24, Award, 17 December 2015, para. 363 (quoting the *Case concerning the Factory at Chorzów (Germany v. Poland)*, Permanent Court of International Justice, Series A, No. 17, p. 47).
[164] Ibid., para. 364.

"no pueden, por razones de orden interno, dejar de asumir la responsabilidad internacional ya establecida".[165]

African Court on Human and Peoples' Rights

117. In *Tanganyika Law Society and Reverend Christopher Mtikila. v. Republic of Tanzania*, the African Court on Human and Peoples' Rights noted that article 32 provided that '"the Responsible State may not rely on the provisions of its internal law as justification for failure to comply with its obligations"'.[166]

International arbitral tribunal (under the ICSID Convention)

118. In *Bernhard von Pezold and others v. Republic of Zimbabwe*, the arbitral tribunal noted that, "[i]nternal laws, per ILC Article 32, do not justify the failure to provide reparation; obstacles in administration or politics are also insufficient. Proportionality is such that restitution is only barred if 'there is a grave disproportionality' between the remedy awarded and the relevant breach".[167] The tribunal also stated that "Article 32 of the ILC Articles prohibits a state from relying on its internal laws to justify non-compliance with its international obligations".[168]

Article 33
Scope of obligations set out in this part

Permanent Court of Arbitration (under UNCITRAL rules)

119. The arbitral tribunal in *Hulley Enterprises Limited (Cyprus) v. The Russian Federation* was "aware that Part II of the ILC Articles on State Responsibility, which sets out the consequences of internationally wrongful acts, is concerned with claims between States and may not directly apply to cases involving persons or entities other than States. That being said, the ILC Articles reflect customary international law in the matter of state responsibility, and to the extent that a matter is not ruled by the ECT and there are no circumstances commanding otherwise, the Tribunal will turn to the ILC Articles on State Responsibility for guidance".[169]

Chapter II
Reparation for injury

General comments

International arbitral tribunal (under the ICSID Convention)

120. In *Bernhard von Pezold and others v. Republic of Zimbabwe*, the arbitral tribunal indicated that "[t]he approach of customary international law to reparation is founded in *Factory at Chorzów*, which is reflected in the ILC Articles on State Responsibility".[170]

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[165] Inter-American Court of Human Rights, Order, 20 March 2013, para. 59, note 38.
[166] African Court on Human and Peoples' Rights, Application Nos. 009/2011 and 011/2011, Judgment, 14 June 2013, para. 108 (quoting article 32).
[167] See note 24 above, para. 690 (quoting para. (11) of the commentary to article 35).
[168] Ibid., para. 725.
[169] See note 7 above, note 10.
[170] See note 24 above, para. 761.

Article 34[171]
Forms of reparation

International arbitral tribunal (under the ICSID Convention)

121. The arbitral tribunal in *Mr Franck Charles Arif v. Republic of Moldova* referred "to the principles of international law summarised in Articles 34, 35 and 36 of the International Law Commission's Articles on State Responsibility"[172] as relevant for the analysis regarding the award of reparation.

International arbitral tribunal (under the ICSID Convention)

122. In *Ioan Micula and others v. Romania*, the arbitral tribunal referred to articles 34 and 36 in acknowledging that the obligation to make full reparation "[i]n most cases ... involves the payment of compensation".[173] It further noted that "the commentary to the ILC Articles limits compensation to 'damage actually suffered as a result of the internationally wrongful act, and excludes damage which is indirect or remote'".[174]

International arbitral tribunal (under the ICSID Convention)

123. In *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. The Argentine Republic*, the arbitral tribunal cited article 34 as authority for the principle that reparation for injury "'shall take the form of restitution, compensation and satisfaction, either singly or in combination'".[175]

African Court on Human and Peoples' Rights

124. The African Court on Human and Peoples' Rights in *Beneficiaries of Late Norbert Zongo, Abdoulaye Nikiema Alias Ablasse, Ernest Zongo and Blaise Ilboudo & the Burkinabe Human and Peoples' Rights Movement v. Burkina Faso*, cited the text of article 34 in support of the view that "reparation may take several forms".[176]

International arbitral tribunal (under the ICSID Convention)

125. In *Bernhard von Pezold and others v. Republic of Zimbabwe*, the arbitral tribunal referred to article 34 of the State responsibility articles as expanding on the principle contained in article 31.[177] Based on the commentary to article 34, the tribunal explained that reparation must achieve "'re-establishment of the situation which existed before the breach'" and explained that "'restitution is only one form of reparation. If restitution alone fails to adequately restore a claimant to the situation it was in prior to the wrong, then other forms of reparation may also be awarded'".[178]

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[171] See also *British Caribbean Bank Limited v. The Government of Belize* referred to under article 31.
[172] See note 46 above, para. 560.
[173] See note 133 above, para. 917.
[174] Ibid., para. 1009 (quoting para. (5) of the commentary to article 34).
[175] See note 16 above, para. 27, note 16 (quoting article 34).
[176] See note 155 above, para. 29.
[177] See note 24 above, para. 684.
[178] Ibid., para. 686 (quoting para. (2) of the commentary to article 34).

International arbitral tribunal (under the ICSID Convention)

126. The arbitral tribunal in *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia* noted that "Article 34 of the ILC Articles includes satisfaction as a form of reparation".[179]

Article 35[180]
Restitution

European Court of Human Rights

127. In *Savriddin Dzhurayev v. Russia*, the European Court of Human Rights referred to article 35 in finding that, in line with the relevant principles of international law, the primary aim of the individual measures to be taken in response to the judgment was to "put an end to the breach of the Convention and make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach".[181] It also referenced article 35 in support of the statement that "while restitution is the rule, there may be circumstances in which the State responsible is exempted — fully or in part — from this obligation, provided that it can show that such circumstances obtain".[182]

Permanent Court of Arbitration (under UNCITRAL rules)

128. The arbitral tribunal in *Hulley Enterprises Limited (Cyprus) v. The Russian Federation*, found "that the principles on the reparation for injury as expressed in the ILC Articles on State Responsibility are relevant in this regard. According to Article 35 of the ILC Articles, a State responsible for an illegal expropriation is in the first place obliged to make restitution by putting the injured party into the position that it would be in if the wrongful act had not taken place. This obligation of restitution applies as of the date when a decision is rendered. Only to the extent where it is not possible to make good the damage caused by restitution is the State under an obligation to compensate pursuant to Article 36 of the ILC Articles on State Responsibility".[183]

European Court of Human Rights

129. In *Davydov v. Russia*, the European Court of Human Rights reiterated, with reference to article 35, that "a judgment in which the Court finds a breach imposes on the respondent State a legal obligation to put an end to the breach and make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach.... This obligation reflects the principles of international law whereby a State responsible for a wrongful act is under an obligation to make restitution, consisting in restoring the situation that existed before the wrongful act was committed, provided that restitution is not 'materially

[179] See note 18 above, para. 554 and note 701.
[180] See also *British Caribbean Bank Limited v. The Government of Belize* referred to under article 31, and *Mr Franck Charles Arif v. Republic of Moldova* referred to under article 34.
[181] ECHR, First Section, Application No. 71386/10, Judgment, 25 April 2013, para. 248.
[182] Ibid., para. 248.
[183] See note 7 above, para. 1766.

impossible' and 'does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation'".[184]

European Court of Human Rights

130. In *Kudeshkina v. Russia* (No. 2), the European Court of Human Rights stated, with reference to article 35, that "[t]he States should organise their legal systems and judicial procedures so that this result [of *restitutio in integrum*] may be achieved".[185] The Court also relied on article 35 in reiterating that "while restitution is the rule, there may be circumstances in which the State responsible is exempted — fully or in part — from this obligation, provided that it can show that such circumstances obtain".[186]

International arbitral tribunal (under the ICSID Convention)

131. In *Bernhard von Pezold and others v. Republic of Zimbabwe*, the arbitral tribunal noted that the State responsibility articles "confirm restitution as the principal form of reparation in international law".[187] It acknowledged, quoting the commentary to article 35, that "restitution restores 'the situation that existed prior to the occurrence of the wrongful act'".[188] Referring to article 2, the tribunal explained that the "[b]reach of a peremptory norm could also justify restitution".[189] The tribunal also observed, with reference to the articles, that restitution "may take, in practice, a wide range of forms",[190] "encompassing any action that needs to be taken by the responsible State to restore the situation".[191]

132. In relation to the limitations on restitution as provided for in subparagraphs (a) and (b), the arbitral tribunal noted that, in determining material impossibility as per article 35, subparagraph (a), "[t]he standard is high".[192] Pursuant to the commentary to article 35, "'restitution is not impossible merely on grounds of legal or practical difficulties, even though the responsible State may have to make special efforts to overcome these'".[193] Citing the second limitation in subparagraph (b), the tribunal found that "[i]t is not disproportionate to award title to lands unlawfully expropriated".[194]

[184] ECHR, First Section, Application No. 18967/07, Judgment (merits and just satisfaction), 30 October 2014, para. 25 (quoting article 35).
[185] ECHR, First Section, Application No. 28727/11, Decision, 17 February 2015, para. 55.
[186] Ibid., para. 55.
[187] See note 24 above, para. 684.
[188] Ibid., para. 686 (quoting para. (2) of the commentary to article 35).
[189] See note 24 above, para. 722.
[190] Ibid., para. 687.
[191] Ibid., para. 740.
[192] Ibid., para. 725.
[193] Ibid., para. 725 (quoting para. (8) of the commentary to article 35).
[194] Ibid., paras. 734-735 (quoting article 35(b)).

Article 36[195]
Compensation

International arbitral tribunal (under the ICSID Convention)

133. The arbitral tribunal in *Ioan Micula and others v. Romania*, observed that article 36, paragraph 2, provides that "'compensation shall cover any financially assessable damage including loss of profits insofar as it is established'".[196]

Arbitration Institute of the Stockholm Chamber of Commerce

134. In *Anatolie Stati, Gabriel Stati, Ascom Group S.A. and Terra Raf Trans Traiding Ltd v. Kazakhstan*, the arbitral tribunal agreed that, "as reflected in Article 36 and Article 39 ... Claimants bear the burden of demonstrating that the claimed quantum of compensation is caused by the host State's conduct".[197] The tribunal also noted that the respondent "rightly referred to the comments in [the] Commentaries on the ILC Articles on State Responsibility and to respective comments in earlier awards that the investor must meet a high standard of proof to establish a claim for lost profits, especially due to the degree of economic, political and social exposure of long-term investment projects. To meet this standard, an investor must show that their project either has a track record of profitability rooted in a perennial history of operations, or has binding contractual revenue obligations in place that establish the expectation of profit at a certain level over a given number of years. This is true even for projects in early stages".[198]

International arbitral tribunal (under the ICSID Convention)

135. In *SAUR International S.A. v. Republic of Argentina*, the arbitral tribunal cited article 36, paragraph 2, when discussing "un principe international bien établi et que les deux parties reconnaissent: une fois les violations avérées, l'investisseur affecté doit obtenir une réparation intégrale qui soit équivalente au paiement d'une indemnisation incluant à la fois le dommage réel et le manque à gagner".[199]

Permanent Court of Arbitration (under UNCITRAL rules)

136. In deciding on the existence of a breach of the Energy Charter Treaty, the arbitral tribunal in *Hulley Enterprises Limited (Cyprus) v. The Russian Federation* referred to the principle contained in article 36 and quoted from the commentary to the article, which states that "'the function of compensation is to address the actual losses incurred as a result of the internationally wrongful act. Compensation corresponds to the financially assessable damage suffered . . . it is not concerned to punish . . . nor does compensation have an expressive or exemplary character"'.[200] The tribunal indicated that while unanticipated events "decrease the value of the right to restitution (and accordingly the right to compensation in lieu of restitution), they do not affect an investor's entitlement to compensation of the damage 'not

[195] See also *Mr Franck Charles Arif v. Republic of Moldova* referred to under article 34.
[196] See note 133 above, para. 920 (quoting article 36 (emphasis omitted)).
[197] Arbitration Institute of the Stockholm Chamber of Commerce, Case No. V (116/2010), Award, 19 December 2013, paras. 1330 and 1452.
[198] Ibid., para. 1688.
[199] ICSID Case No. ARB/04/4, Award, 22 May 2014, para. 160, note 105 (footnote omitted).
[200] See note 7 above, para. 1590 (quoting para. (4) of the commentary to article 36). See also the references to article 36 in note 147 and note 183 above.

made good by restitution' within the meaning of Article 36(1) of the ILC Articles on State Responsibility".[201]

International arbitral tribunal (under the ICSID Convention)

137. In *Tidewater Investments SRL and Tidewater Caribe C.A. v. The Bolivarian Republic of Venezuela*, the arbitral tribunal referenced the commentary to article 36 in support of "the standard of compensation to be applied in cases of lawful compensation, where the investment constituted a going concern at the time of the taking. The Guidelines prescribe 'the fair market value of the taken asset as such value is determined immediately before the time at which the taking occurred'".[202]

International arbitral tribunal (under the ICSID Convention)

138. The arbitral tribunal in *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. The Argentine Republic* referred to article 36 in support of the view that "the basic standard to be applied is that of full compensation (*restitutio in integrum*) for the loss incurred as a result of the internationally wrongful act", which represents "the accepted standard in customary international law".[203]

International arbitral tribunal (under the ICSID Convention)

139. The arbitral tribunal in *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia* indicated with reference to article 36 that, "if restitution in kind is impossible or not practicable, the compensation awarded must wipe out all the consequences of the wrongful act", and that "'compensation shall cover any financially assessable damage, including loss of profits insofar as it is established'".[204] It also observed that it was required to "value the loss with reasonable certainty".[205]

International arbitral tribunal (under the ICSID Convention)

140. In *Hrvatska Elektroprivreda d.d. v. Republic of Slovenia*, the arbitral tribunal relied on article 36 as "reflecting the principle in *Chorzów Factory*" when stating that "it is trite to observe that the Claimant can only recover in compensation the loss that it has actually suffered".[206]

International arbitral tribunal (under the ICSID Convention)

141. The arbitral tribunal in *Tenaris S.A. and Talta — Trading e Marketing Sociedade Unipessoal Lda v. Bolivarian Republic of Venezuela* stated that the State responsibility articles "are currently considered to be the most accurate reflection of customary international law" regarding the measurement and calculation of compensation.[207] Regarding the determination of fair market value, the arbitral tribunal noted that "[e]ach tribunal must, thus, attempt to give meaning both to the

[201] Ibid., para. 1768.
[202] ICSID, Case No. ARB/10/5, Award, 13 March 2015, para. 153, note 241.
[203] See note 16 above, para. 27.
[204] See note 18 above, para. 328 (quoting article 36).
[205] Ibid., para. 384.
[206] See note 163 above, para. 238, note 19.
[207] See note 68 above, para. 515.

words of the treaty regarding the putative valuation date, as well as to the standard set forth in Article 36 of the ILC Articles, and the ruling of the PCIJ in the *Chorzów* case".[208]

Article 37
Satisfaction

International arbitral tribunal (under the ICSID Convention)

142. In *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia*, the arbitral tribunal, following a detailed examination of the remedy of satisfaction under international law, found that "the remedies outlined by the ILC Articles may apply in investor-state arbitration depending on the nature of the remedy and of the injury which it is meant to repair".[209] It further noted that "[t]he fact that some types of satisfaction are not available does not mean that the Tribunal cannot make a declaratory judgment as a means of satisfaction under Article 37 of the ILC Articles, if appropriate".[210]

Article 38[211]
Interest

International arbitral tribunal (under the ICSID Convention)

143. In *Mr Franck Charles Arif v. Republic of Moldova*, the arbitral tribunal noted that "Article 38 of the International Law Commission's Articles on State Responsibility confirms that interest will be payable 'when necessary in order to ensure full reparation'. It also confirms that the general view in international law is in favour of simple and not compound interest, although other commentators suggest the trend in investment arbitration is in favour of compound interest".[212]

International arbitral tribunal (under the ICSID Convention)

144. The arbitral tribunal in *Ioan Micula and others v. Romania* agreed that the "overwhelming trend among investment tribunals is to award compound rather than simple interest", which was not reflected in the commentary to article 38 relied on by the respondent.[213] The tribunal further noted that, according to the commentary to article 38, an award of interest is inappropriate where it would result in double recovery, but "interest may be due on the profits which would have been earned but which have been withheld from the original owner".[214]

Permanent Court of Arbitration (under UNCITRAL rules)

145. The arbitral tribunal in *Hulley Enterprises Limited (Cyprus) v. The Russian Federation* referred to article 38 and the commentary thereto, as part of the legal framework relevant for the award of interest.[215] It went on to note that "the ILC

[208] Ibid., para. 543 (footnotes omitted).
[209] See note 18 above, para. 555 (see paras. 550-560 for the full discussion).
[210] Ibid., para. 560.
[211] See also *British Caribbean Bank Limited v. The Government of Belize* referred to under article 31.
[212] See note 46 above, para. 617.
[213] See note 133 above, para. 1266.
[214] Ibid., para. 1275 (quoting para. (11) of the commentary to article 38).
[215] See note 7 above, paras. 1652-1653.

Articles on State Responsibility [do not] provide specific rules regarding how interest should be determined".[216]

International arbitral tribunal (under the ICSID Convention)

146. In *Suez, Sociedad General de Aguas de Barcelona S.A. and Vivendi Universal S.A. v. The Argentine Republic*, the arbitral tribunal indicated, based on article 38, that "customary international law authorizes the payment of interest on the principal sum due from the time the amount should have been paid until the date when the payment obligation is actually fulfilled".[217]

International arbitral tribunal (under the ICSID Convention)

147. In *Bernhard von Pezold and others v. Republic of Zimbabwe*, the arbitral tribunal relied on article 38 to explain that pre-award interest, as opposed to post-award interest, "is granted in order to ensure full reparation",[218] and to note that "it is relevant to take into account the returns the Claimants might have earned on these investments because, had they been immediately compensated for the wrongs they suffered, this is where the Claimants contend they would have invested their wealth".[219]

International arbitral tribunal (under the ICSID Convention)

148. In *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia*, the arbitral tribunal noted that, according to the commentary to article 38, "'[w]here a sum for loss of profits is included as part of the compensation for the injury caused by a wrongful act, an award of interest will be inappropriate if the injured State would thereby obtain double recovery,' because '[a] capital sum cannot be earning interest and notionally employed in earning profits at one and the same time.' However, ... 'interest may be due on the profits which would have been earned but which have been withheld from the original owner'".[220] The tribunal also noted that it was "aware that the Commentary to ILC Article 38, which the Respondent also invokes, states that '[t]he general view of courts and tribunals has been against the award of compound interest.' Yet, a review of arbitral decisions shows that compound interest has been deemed to 'better reflect ... contemporary financial practice' and to constitute 'the standard of international law in ... expropriation cases.' The view that compound interest better achieves full reparation has been adopted in a large number of decisions and is shared by this Tribunal".[221]

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[216] Ibid., para. 1678.

[217] See note 16 above, para. 27, note 19.

[218] See note 24 above, para. 943.

[219] Ibid., para. 947.

[220] See note 18 above, para. 514 (quoting para. (11) of the commentary to article 38).

[221] Ibid., para. 524 (quoting para. (8) of the commentary to article 38, and the cases of *LG&E v. Argentina*, ICSID Case No. ARB/02/1, Award, 25 July 2007, para. 103; *Middle East Cement Shipping and Handling Co. S.A. v. Arab Republic of Egypt*, ICSID Case No. ARB/99/6, Award, 12 April 2002, para. 174; *Occidental v. Ecuador II*, ICSID Case No. ARB/06/11, Award, 5 October 2012, para. 840; *El Paso v. Argentina*, ICSID Case No. ARB/03/15, Award, 31 October 2011, para. 745; *Vivendi v. Argentina II*, ICSID Case No. ARB/97/3, Award, 20 August 2007, para. 9.2.6; and *Wena v. Egypt*, ICSID Case No. ARB/98/4, Award, 8 December 2000, para. 129 (footnotes omitted)).

International arbitral tribunal (under the ICSID Convention)

149. In *Hrvatska Elektroprivreda d.d. v. Republic of Slovenia*, the arbitral tribunal relied on article 38 and the commentary thereto when stating that "[t]his principle of full reparation thus guides the Tribunal in making its finding on interest".[222]

International arbitral tribunal (under the ICSID Convention)

150. In *Tenaris S.A. and Talta — Trading e Marketing Sociedade Unipessoal Lda v. Bolivarian Republic of Venezuela*, in determining the interest due upon the compensation awarded, the arbitral tribunal referred to article 38 and the commentary thereto.[223]

Article 39
Contribution to the injury

International arbitral tribunal (under the ICSID Convention)

151. In *Ioan Micula and others v. Romania*, the arbitral tribunal relied on article 39 and the accompanying commentary to support the proposition that "cases of contributory fault by the injured party appear to warrant solely a reduction in the amount of compensation"[224] and not a release of the responsible State from liability.

Arbitration Institute of the Stockholm Chamber of Commerce

152. In *Anatolie Stati, Gabriel Stati, Ascom Group S.A. and Terra Raf Trans Traiding Ltd v. Kazakhstan*, the arbitral tribunal agreed with the parties that "Article 39 [of the] ILC Articles requires that the Claimants' conduct be taken into account in determining compensation"[225] and that "the burden may shift to the state to prove that a factor attributable to the victim or a third party caused the damage alleged, unless the injury can be shown to be severable in causal terms from that attributed to the State".[226]

Permanent Court of Arbitration (under UNCITRAL rules)

153. In assessing the contributory fault of the claimants, the arbitral tribunal in *Hulley Enterprises Limited (Cyprus) v. The Russian Federation* referred to article 39 and the commentary thereto, in conjunction with article 31, to "decide, on the basis of the totality of the evidence before it, whether there is a sufficient causal link between any wilful or negligent act or omission of the Claimants (or of Yukos, which they controlled) and the loss Claimants ultimately suffered at the hands of the Russian Federation through the destruction of Yukos".[227] "Paraphrasing the words of Article 39 of the ILC Articles on State Responsibility and its commentary", the tribunal had to "determine whether Claimants' and Yukos' tax avoidance arrangements in some of the low-tax regions, including their questionable use of the Cyprus-Russia DTA summarized above, contributed to their injury in a material and significant way, or were these minor contributory factors which, based on

[222] See note 163 above, para. 539 (quoting para. (2) of the commentary to article 38).
[223] See note 68 above, paras. 575-576.
[224] See note 133 above, para. 926, note 180.
[225] See note 197 above, para. 1452. See also the reference to article 39 in note 197 above.
[226] Ibid., para. 1452.
[227] See note 7 above, paras. 1592. See also the reference to article 39 in note 147 above.

subsequent events such as the decision of the Russian authorities to destroy Yukos, cannot be considered, legally, as a link in the causative chain".[228]

Part Three[229]
The implementation of the international responsibility of a State

Chapter I
Invocation of the responsibility of a State

Article 43
Notice of claim by an injured State

International arbitral tribunal (under the ICSID Convention)

154. The arbitral tribunal in *Mr Franck Charles Arif v. Republic of Moldova* referred to the commentary to article 43 in support of the view that "the general position in international law is that the injured State may elect between the available forms of reparation and may prefer compensation to restitution".[230]

Article 44
Admissibility of claims

International arbitral tribunal (under the ICSID Convention)

155. The arbitral tribunal in *Philip Morris Brands Sàrl, and others v. Uruguay* noted that "[t]he reference [by the claimants] to Art. 44 of the ILC Articles is inapposite in that the issue in this case was not one of exhaustion of local remedies".[231]

Permanent Court of Arbitration (under UNCITRAL rules)

156. In *ST-AD GmbH v. Republic of Bulgaria*, the arbitral tribunal relied on, inter alia, article 44, subparagraph (b), in support of the view that "the obligation to exhaust domestic remedies forms part of customary international law, recognised as such in the case law of the ICJ".[232] Specifically, the tribunal noted that the article "refers to the exhaustion of any 'available and effective local remedy'".[233]

Article 45
Loss of the right to invoke responsibility

World Trade Organization Appellate Body

157. The Appellate Body in *Peru — Additional Duty on Imports of Certain Agricultural Products* indicated that "there is no need for us to address whether the ... ILC Articles 20 and 45 are 'rules of international law applicable in the

[228] Ibid., para. 1633.
[229] See also *The Rompetrol Group N.V. v. Romania* referred to under article 31.
[230] See note 46 above, note 264.
[231] ICSID Case No. ARB/10/7 (formerly *FTR Holding S.A., Philip Morris Products S.A., and Abal Hermanos S.A. v. Oriental Republic of Uruguay*), Decision on Jurisdiction, 2 July 2013, para. 135.
[232] UNCITRAL, PCA Case No. 2011-06, Award on Jurisdiction, 18 July 2013, para. 365.
[233] Ibid., note 395.

relations between the parties', or the meaning of the term 'parties' in both Article 31(3)(a) and (c) of the Vienna Convention".[234]

Part Four
General provisions

Article 55[235]
Lex specialis

International arbitral tribunal (under the ICSID Convention)

158. In *Adel A Hamadi Al Tamimi v. Sultanate of Oman*, the arbitral tribunal accepted the respondent's submission that "contracting parties to a treaty may, by specific provision (*lex specialis*), limit the circumstances under which the acts of an entity will be attributed to the State. To the extent that the parties have elected to do so, any broader principles of State responsibility under customary international law or as represented in the ILC Articles cannot be directly relevant".[236]

Article 58
Individual responsibility

European Court of Human Rights

159. In *Jones and Others v. the United Kingdom*, the European Court of Human Rights cited article 58 as relevant international law, noting that "Article 58 clarifies the position in respect of simultaneous individual responsibility".[237] It also referred to the article in support of the finding that "there is no doubt that individuals may in certain circumstances also be personally liable for wrongful acts which engage the State's responsibility, and that this personal liability exists alongside the State's liability for the same acts".[238] With regard to the existence of "a special rule or exception in public international law in cases concerning civil claims for torture lodged against foreign State officials", the Court more specifically observed that "[t]aking the applicants' arguments at their strongest, there is evidence of recent debate surrounding ... the interaction between State immunity and the rules on attribution in the Draft Articles on State Responsibility".[239]

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[234] WTO, Appellate Body Report, WT/DS457/AB/R and Add. 1, 20 July 2015, para. 5.105 (as restated in paras. 5.118 and 6.4), see also notes 126 and 127 above.

[235] See also *Ioan Micula and others v. Romania* referred to under article 28 and *British Caribbean Bank Limited v. The Government of Belize* referred to under article 31 above.

[236] See note 66 above, para. 321 (footnote omitted).

[237] See note 49 above, para. 109.

[238] Ibid., para. 207.

[239] Ibid., para. 213.